

OPINION

The Defendant appeals as of right from a jury verdict convicting him of felony murder and especially aggravated robbery stemming from the death of Howard Palmer. The trial court sentenced the Defendant to serve a life sentence for the felony murder and a consecutive sentence of twenty years for the especially aggravated robbery.

The Defendant presents four issues on appeal: (1) Whether the trial court erred in denying his motion to suppress his tape-recorded statement; (2) whether the evidence is sufficient to support a finding that the Defendant is guilty of felony murder beyond a reasonable doubt; (3) whether the trial court erred in denying the Defendant's special requested jury instruction concerning felony murder; and (4) whether the trial court erred in imposing an excessive sentence for the Defendant's especially aggravated robbery conviction and by imposing consecutive sentences.

We affirm the judgment of the trial court.

On the night of March 26, 1993, the Defendant and the co-defendant, Donna Faye Rye, ran into each other at a dollar store in Nashville. The co-defendant left the store with the Defendant, and the two subsequently went to an abandoned house that had previously burned in a fire.

Cynthia Richardson, the victim's girlfriend, testified that she last saw the victim alive on Friday evening, March 26, 1993, at the residence they shared in Nashville. Ms. Richardson testified that she was sleeping, and at about 11:45, she was awakened by the sound of the victim's truck. Ms. Richardson testified that she went back to sleep, and when she awoke the next morning, the victim was not home. After unsuccessfully

trying to locate him, she filed a missing person report with the police on Sunday, March 28, 1993. The police found the victim's truck on that same day in the Madison area of Nashville, and a short time later, located his body in an abandoned house at 1119 Fatherland Street, just four houses away from the victim's residence.

The Defendant, in his taped confession at the police station, said that he and the co-defendant were drinking beer in the burned house when they saw the victim. The three people then went to another abandoned house where they smoked a marijuana cigarette and continued drinking. The Defendant admitted that he hit the victim several times in the head with an automobile bumper jack handle. The Defendant said that he did this at the urging of the co-defendant who had told him that the victim had been making advances toward her. The Defendant said that Ms. Rye, the co-defendant, also hit the victim in the head with the tire tool and took the victim's wallet. Rye then found the victim's truck which she and the Defendant drove to the Madison area where they abandoned it.

Officer Jesse Birchwell of the Nashville Metropolitan Police Department testified that on March 28, 1993, he responded to a call. Upon his arrival, he spoke with Donna Faye Rye, who told him that she had found a body in a nearby abandoned house on Fatherland Street. Officer Birchwell and Ms. Rye went to the house, where he discovered the victim's body lying on the floor with a pillow over his head.

Later that day during an interview at the police station, Rye gave the Defendant's name as a possible suspect in the murder. Detective Randall Fowler, the officer that conducted the interview with Rye, testified that he then contacted the Defendant's family in an unsuccessful attempt to locate him.

Officer Cory McClellan testified that while he was on patrol on April 2, 1993, the Defendant's sister flagged him down and told him that the Defendant was staying in a nearby motel. The officer then went to the hotel room and arrested the Defendant. Officer McClellan testified at trial that when he entered the room, he saw that the Defendant was drinking and that there was about a case of beer in the room, half of which had been consumed.

Detective Fowler testified that he was at home on the date of the Defendant's arrest and that he received a telephone call from a detective advising him that the Defendant was in custody and wanted to talk to him. Fowler testified that the Defendant said over the telephone that he was involved in the murder, but that Rye also participated. Rye was subsequently charged with murder, and her case was severed from that of the Defendant.

I. Motion to Suppress

The Defendant first contends that the trial court erred in denying the Defendant's motion to suppress the tape-recorded statement that he made to the police. The Defendant made several incriminating oral statements on the evening of his arrest, including a statement that was tape-recorded in which the Defendant described his part in the murder. The Defendant filed a pre-trial motion asking the trial court to suppress these various statements. The trial court denied the Defendant's motion, and the statements were admitted into evidence at trial.

The Defendant argues that the evidence at the suppression hearing established that he was so intoxicated at the time that he made the statement that he could neither understand his right not to give a statement, nor knowingly and voluntarily waive his rights. Therefore, he contends that his confession was not voluntary within the

meaning of the Due Process Clause of the Fourteenth and Fifth Amendments to the United States Constitution and Article I, section 9, of the Tennessee Constitution.

During the days after the murder, the Defendant was staying in a motel in Nashville. He contacted his sister and told her that he wanted to get drunk before he turned himself in to the police. The Defendant's sister brought beer to the hotel room before later flagging down Officer McClellan and telling him where her brother was staying. At the suppression hearing, Officer McClellan testified that he saw a twelve-pack of beer in the hotel room, half of which had already been consumed.¹ Officer McClellan also testified that when he arrived at the motel, the Defendant had just started drinking. The officer allowed the Defendant to finish a can of beer, then arrested him and took him to the police station. Although Officer McClellan did not question him, the Defendant made numerous statements to the effect that he had killed the victim because the co-defendant had told him to and that the co-defendant had also hit the victim.

At police headquarters, the Defendant was questioned by Detectives Bobby Lawrence and Clifford Mann. At the suppression hearing, Detective Lawrence testified that he heard the Defendant say that he drank a twelve-pack of beer. Lawrence noted in his police report that the Defendant "appeared to be under the influence to a certain extent, but I believe he does realize what he is doing and saying." Detective Lawrence said that the Defendant's speech was not slurred, but that he repeatedly asked the same questions. Detective Lawrence also testified that the Defendant appeared to understand his Miranda rights and seemed anxious to talk to the police.

¹Officer McClellan testified at trial that he saw a case of beer in the room, however the discrepancy between his testimony at the suppression hearing and the trial regarding the amount of beer in the room was not explored at trial.

Officer Mann testified that although the Defendant said that he had consumed a twelve-pack of beer, the Defendant did not appear to have been drinking . Officer Mann testified that he read the Miranda rights to the Defendant and that the Defendant appeared to understand these rights. Mann said, however, that the Defendant refused to sign the waiver of rights form because Ms. Rye had not yet been arrested, and he did not want her to escape punishment for her part of the crime.

Mann and Lawrence then took a taped statement from the Defendant. In the statement, the Defendant said that he understood his Miranda rights and explicitly waived the right to remain silent. The Defendant told the officers, "You ain't coercing me into signing nothing. I understand . . ." The Defendant then related the sequence of events on the night of the murder. He admitted that he had killed the victim at Ms. Rye's urging, that she had also hit the victim with the tire tool, and that they took the victim's money and truck and left the scene.

The Defendant contends that his comments and actions made immediately after the arrest are indicative of his intoxication. First, the Defendant refused to sign a written waiver of his Miranda rights. The Defendant asserts that the statement he made to the officers, "you ain't coercing me into signing nothing," indicates the Defendant's mistaken belief, to which his intoxication contributed, that his statements could not be used against him without his signature.

Second, the Defendant says that his statement was often rambling, nonresponsive, and inconsistent because of his intoxication. More specifically, the Defendant points to his statements which give conflicting versions of how the victim was killed. The Defendant told police that the victim died from the first blow struck by the Defendant, yet he later said that after he hit the victim twice, Ms. Rye hit the victim three times as the victim attempted to get up. Also, the Defendant first told police that

a pillow was already on the victim's head when Ms. Rye struck him, then later stated that he placed the pillow over the victim's head after Ms. Rye had struck the victim. The Defendant also points to a discrepancy in the Defendant's statement as to when he and Ms. Rye took the victim's money. The Defendant told the detectives that he took the money out of the victim's pocket, but elsewhere in the statement he said that Ms. Rye went in and took the cash from the victim.

The Defendant contends that the inconsistent comments illustrate that when the statement was made, he was so intoxicated that he was incapable of understanding or waiving his Miranda rights. Additionally, the Defendant contends that the police were aware before they made the arrest that he planned to get drunk before surrendering himself. He accordingly contends that his intoxication invalidated the waiver of his constitutional rights, and the trial court committed reversible error in denying the motion to suppress his tape-recorded confession.

It is a well-settled proposition that in order to be valid, a waiver must be made "voluntarily, knowingly and intelligently." Miranda v. Arizona, 384 U.S. 436, 444 (1966). The issue of waiver must be decided based on the totality of circumstances surrounding each particular case. State v. Benton, 759 S.W.2d 427, 431-32 (Tenn. Crim. App. 1988). The trial court's findings of fact on a motion to suppress have the weight of a jury verdict and will not be reversed unless the evidence preponderates against them. State v. Woods, 806 S.W.2d 205, 208 (Tenn. Crim. App. 1990), perm. to appeal denied, id. (Tenn. 1991); see State v. Harbison, 704 S.W.2d 314, 318 (Tenn. 1986); State v. Kelly, 603 S.W.2d 726, 728-29 (Tenn. 1980). The wisdom of the Defendant in deciding to make a statement and his failure to foresee the effects of that statement are not relevant to the determination of a valid waiver. See State v. Riddle, 551 F.2d 936, 939 (4th Cir. 1977).

On appeal, we are bound to accept the trial court's finding as to the voluntariness of the confession, unless the evidence preponderates against it. State v. David E. Walton, Jr., No. 02C01-9501-CC-00007, Crockett County (Tenn. Crim. App., Jackson, filed Aug. 9, 1995). The trial court, after listening to the testimony of the police officers that dealt with the Defendant after his arrest and after listening to the audio tape of the Defendant's confession, concluded that although the Defendant may have been drinking, his statement was nonetheless made voluntarily. The court said that after listening to the taped statement, he found the Defendant to be coherent and that the Defendant understood what he was saying and the point he was trying to make. The trial court went on to say that the Defendant knew exactly what he was acknowledging and that he was trying to suggest that someone else also had some responsibility in the crime.

In considering the totality of the circumstances surrounding the confession, we conclude that the evidence does not preponderate against the findings of the trial court. Although the record clearly indicates that the Defendant had been drinking prior to making the taped statement, the trial court accredited the State's witnesses and their testimony that the Defendant did not appear to be so intoxicated that he did not know what he was doing or saying. Testimony of the police officers indicated that the Defendant did not smell of alcohol, nor did he have slurred speech or trouble walking. Additionally, the inconsistencies in the Defendant's statement do not conclusively establish that the Defendant was too intoxicated to knowingly and intelligently waive his right to remain silent.

The trial court resolved the conflicting testimony relevant to the Defendant's arguments that his confession was involuntary because of intoxication in the State's favor. We conclude that the evidence in the record does not preponderate against the

findings of the trial court and that the trial court did not err in denying the Defendant's motion to suppress the taped statement.

This issue is without merit.

II. Sufficiency of the Evidence

The Defendant next contends that the evidence in the record is insufficient to support a finding by a rational trier of fact that the Defendant is guilty of felony murder beyond a reasonable doubt.

When an accused challenges the sufficiency of the convicting evidence, this court must review the record to determine if the evidence adduced during the trial was sufficient "to support the findings by the trier of fact of guilt beyond a reasonable doubt." T.R.A.P. 13(e). This rule is applicable to findings of guilt predicated upon direct evidence, circumstantial evidence, or a combination of direct and circumstantial evidence. State v. Matthews, 805 S.W.2d 776, 779 (Tenn. Crim. App. 1990).

In determining the sufficiency of the evidence, this court does not reweigh or reevaluate the evidence. State v. Cabbage, 571 S.W.2d 832, 835 (Tenn. 1978). Nor may this court substitute its inferences for those drawn by the trier of fact from circumstantial evidence. Liakas v. State, 199 Tenn. 298, 305, 286 S.W.2d 856, 859 (Tenn. 1956). This court is required to afford the State of Tennessee the strongest legitimate view of the evidence contained in the record as well as all reasonable and legitimate inferences which may be drawn from the evidence. State v. Herrod, 754 S.W.2d 627, 632 (Tenn. Crim. App. 1988).

Questions concerning the credibility of the witnesses, the weight and value to be given the evidence, as well as all factual issues raised by the evidence, are resolved by the trier of fact, not this court. State v. Pappas, 754 S.W.2d 620, 623 (Tenn. Crim. App. 1987). In State v. Grace, 493 S.W.2d 474 (Tenn. 1973), the Tennessee Supreme Court said, "A guilty verdict by the jury, approved by the trial judge, accredits the testimony of the witnesses for the State and resolves all conflicts in favor of the theory of the State." Id. at 476.

Because a verdict of guilt removes the presumption of innocence and replaces it with a presumption of guilt, id., the accused has the burden in this court of illustrating why the evidence is insufficient to support the verdict returned by the trier of fact. State v. Tuggle, 639 S.W.2d 913, 914 (Tenn. 1982). This court will not disturb a verdict of guilt due to the sufficiency of the evidence unless the facts contained in the record and the inferences which may be drawn from the facts are insufficient, as a matter of law, for a rational trier of fact to find the accused guilty beyond a reasonable doubt. Matthews, 805 S.W.2d at 780.

The Defendant specifically argues that the evidence adduced at trial fails to establish that the victim's murder was committed "in the perpetration of" especially aggravated robbery, for purposes of the felony murder statute. Tennessee Code Annotated § 39-13-202(a)(2). Instead, he contends that the robbery was committed as an afterthought to the murder. Thus, because the murder was not committed in perpetration of the robbery, the proof can only support a conviction for the lesser charge of second degree murder. Tenn. Code Ann. § 39-13-210.

In support of his contention, the Defendant argues that the evidence did not show that he or the co-defendant planned to rob the victim. Rather, he says that the proof showed that the two defendants and the victim had been drinking and smoking

marijuana in an abandoned house. Ms. Rye then told the Defendant that the victim was making advances toward her, and urged the Defendant to kill him. The Defendant then struck the victim several times with the tire jack, and the co-defendant did the same.

According to the Defendant's statement, the co-defendant knew the victim. He said, however, that they did not decide to take the victim's money and the truck until after they had fatally struck the victim.

Unlawfully killing another while perpetrating or attempting to perpetrate a felony constitutes first degree felony murder. Tenn. Code Ann. § 39-13-202(a)(2). Although intent to kill is not required under the felony murder statute, the perpetrator must possess the requisite intent to commit the underlying felony for a felony murder conviction to be sustained. The jury determines criminal intent after reviewing all of the facts and circumstances. State v. Holland, 860 S.W.2d 53, 59 (Tenn. Crim. App. 1993).

It is a long-standing tenet of Tennessee law that to sustain a conviction for felony murder, the killing must have been done in pursuance of the felony and must not merely be collateral to the unlawful act. State v. Severs, 759 S.W.2d 935, 938 (Tenn. Crim. App. 1988). In other words, for a murder to be done in "perpetration of" the felony, "[t]he killing must have had an intimate relation and close connection with the felony and not be separate, distinct, and independent from it." Farmer v. State, 201 Tenn. 107, 296 S.W.2d 879, 883 (1956) (citing Wharton on Homicide, § 126).

Viewing the evidence in the light most favorable to the State, the evidence supports the Defendant's conviction for especially aggravated robbery and supports the jury's determination that the Defendant had formed the intent to rob the victim at the

time he killed him. In his taped statement to police, the Defendant said that Ms. Rye told him before the killing that the victim had money:

DETECTIVE MANN: Why did she tell you to do it?

MR. RUSHING: She told me he made a pass at her. And then she said, "Talk. Keep on talking." And said, "He . . . he's looking at me, Dennis. He's looking at me." She said, "he's got money." Said, "he lives right down here." She said, "Let's do it." And she said something about Bonnie and Clyde, and I said, "What the fuck you talking about Bonnie and Clyde?"

DETECTIVE MANN: How much money did he have on him?

MR. RUSHING: Sixty (\$60.00) dollars.

DETECTIVE MANN: Who got the money out of his pocket?

MR. RUSHING: I did.

DETECTIVE MANN: What about his wallet?

MR. RUSHING: She got his wallet. She told me, said, "They ain't no..." I don't know why, she said, "I don't remember what I did with his wallet." And she started laughing about it and shit

DETECTIVE LAWRENCE: She told you he had made a pass at her and for you to do something about it. Did you say you need

MR. RUSHING: No. She said, "Do it. Do it. Do it now. Do it now."

After the Defendant and Ms. Rye beat the victim with the tire tool, they took his wallet and went and got the victim's truck from where he had parked it earlier. Later in the Defendant's statement, he told the police about taking the truck:

MR. RUSHING: After that . . . we walked down there and she said, "his truck's down here." Said, "I know he lives down here." She helped me push it off, started it. She got in there with me. She told me where his truck was. I didn't . . . couldn't believe she knew where his truck was. She knew the man. I didn't even know the man.

DETECTIVE MANN: Who got the keys out of his pocket?

MR. RUSHING: We didn't have no keys.

DETECTIVE MANN: Well, how did you start the truck?

MR. RUSHING: He left them in his truck. No, wait a minute. I searched his pocket, and she wanted to go for the money, and she went in there and got the cash. She came out with a damn wallet. And she started going this way, and I . . . she said, "the truck's right down here. Go start it up. I'll meet you around the corner." I went down there and it wouldn't start. So I walked back and I said, "Come here," you know, "I need your help," you know. "You need to help me push it off." So she walked down there with me and helped me push it off.

From this evidence, a rational trier of fact could determine that the robbery and the killing were so closely connected that they could not be considered separate and distinct events. The Defendant and the co-defendant talked about robbing the victim before they committed the murder. Even though the Defendant testified that the reason they murdered the victim was because of his advances toward the co-defendant, the record supports the jury's finding that the robbery was a motivating factor in the killing so as to support a finding that the Defendant was guilty of felony murder.

This issue has no merit.

III. Jury Instruction

The Defendant next contends that the trial court erred in denying the Defendant's special requested jury instruction concerning felony murder. At trial, the Defendant requested a special jury instruction on the legal relationship between the murder and the underlying felony. The proposed instruction read as follows:

For you to find the defendant guilty of the offense of first degree murder as set forth in count 1 of the indictment, the state must have proven beyond a reasonable doubt that the killing was committed in perpetration of the robbery. Thus, you must find that the Defendant at the time of or prior to the killing had the intent to commit the alleged robbery in order to find the defendant guilty. Mere coincidence in time between the killing and the especially aggravated robbery is insufficient to support a conviction. Should you find that the intent to commit robbery was not formed until after the killing, you must find the defendant not guilty of first degree murder. See United States v. Bolden, 514 F.2d 1301, 1307 (D.C. Cir. 1975).

The trial court denied the Defendant's requested jury instruction and instead relied upon the Tennessee Pattern Jury Instruction on felony murder, which reads in part:

That the killing was committed in the perpetration of or the attempt to perpetrate robbery. Robbery is the intentional or knowing theft of property from the person of another by violence or putting the person in fear. That is, that the killing was closely connected to the alleged robbery and was not a separate, distinct and independent event.

7 Tennessee Pattern Jury Instruction, T.P.I. Crim. § 7.03 (1992).

The Defendant argues that the Tennessee jury instruction does not sufficiently inform the jury that in order to sustain a conviction for felony murder, the intent to commit the underlying felony must precede the murder. He contends that the jury could have convicted him even though the robbery was an afterthought as long as the robbery and the murder were "closely connected." The Defendant submits that his proposed instruction should have been used because it clearly explains that the intent to commit the underlying felony must precede the murder.

The Defendant's proposed special instruction was taken from the federal case of United States v. Bolden, 514 F.2d 1301 (D.C. Cir. 1975). In Bolden, the District of Columbia Court of Appeals reversed the defendants' convictions for felony murder because the trial court's instructions to the jury left the impression that mere

coincidence in time between the murder and robbery was sufficient to sustain a felony murder conviction.

The Defendant also notes that other jurisdictions, applying the principles set forth in the jury instruction that he requested, have reversed convictions for felony murder when the evidence established that the defendant did not intend to commit the underlying felony until after the murder had occurred. Commonwealth v. Spallone, 406 A.2d 1146 (Pa. Super. Ct. 1979).

In Tennessee, the trial court must charge the jury completely on the law applicable to the facts of the case. Poe v. State, 370 S.W.2d 488, 491 (Tenn. 1963). Although special requests usually are entertained if fundamental to the case, the trial judge may deny a special request when the existing instructions fully cover the law on a subject. State v. Bryant, 654 S.W.2d 389, 390 (Tenn. 1983); 11 David L. Raybin, Tennessee Criminal Practice and Procedure, § 30.22 (1985) (citing Souey v. State, 81 Tenn. (13 Lea) 472, 480 (1884) ("[P]arties to a state prosecution . . . have the right not only to a correct charge of the general principles of law applicable to the character of the case, but to a specific charge, if requested, of the law applicable to the particular facts of the case.")). Special jury instructions need not be given when the existing instructions are a correct statement of the law and adequately cover the subject matter contained in the special request. Id. (referencing Shell v. State, 584 S.W.2d 231 (Tenn. Crim. App. 1979)); see State v. Taylor, 771 S.W.2d 387, 399 (Tenn. 1989) (Tennessee Supreme Court found that the trial court did not err in failing to give numerous special and sua sponte instructions when the instructions given were accurate and covered the areas included in the special requests).

The Defendant's primary assertion is that the pattern instruction did not sufficiently explain that the Defendant must have had the intent to commit the

underlying felony prior to the commission of the murder. The State cites cases from other jurisdictions that do not follow the reasoning of Bolden. These cases hold that in order to sustain a conviction for felony murder, the State need only show that the felony and the murder were all part of the same transaction, and that lack of intent to commit the underlying felony at the moment of the killing is not a defense. See Cleveland v. State, 865 S.W.2d 285 (Ark. 1993); Grigsby v. State, 542 S.W.2d 275 (Ark. 1976); State v. Craig, 514 P.2d 151 (Wash. 1973).

The statute proscribing felony murder defines the crime as the "reckless killing of another committed in the perpetration of or attempt to perpetrate" any of several enumerated felonies.² Tenn. Code Ann. § 39-13-202(2). As the jury instructions elaborate, our law requires that the killing be "closely connected" to the felony and not a "separate, distinct and independent event." As we previously determined, the jury, within its province as trier of fact, determined that the killing was indeed "closely connected" to the robbery, and we concluded that the evidence was sufficient to support the jury's verdict.

The felony murder statute in Bolden is very similar to that in Tennessee. The federal appellate court in Bolden reversed the Defendant's conviction because the court's instructions left the impression that a mere coincidence in time between the felony and the killing was sufficient to sustain a felony murder conviction. However, two important distinctions can be made between that case and the case sub judice. First, in Bolden, the jury was confused as to the time element in forming the intent required in a felony murder case and specially requested that the judge clarify the instructions, which he did not do. Here, the jury did not request clarification of the felony murder instructions. Second, the instructions in Bolden could have, and obviously did, confuse

²Effective July 1, 1995, the legislature deleted the word "reckless" from the felony murder definition.

the jury as to whether a mere coincidence in time between the killing and the felony would be enough to support a felony murder conviction. In the case sub judice, the instructions clearly state that the felony and the killing must be so closely connected that the killing cannot be considered a separate or distinct event. However, these instructions do not suggest that a mere coincidence in time between the two events would suffice to sustain a felony murder conviction.

We conclude that the instructions given by the trial court are a correct statement of the law and adequately cover the subject matter contained in the special request. We, therefore, hold that the trial court did not err in refusing to give the Defendant's specially requested instruction.

IV. Sentencing

Finally, the Defendant contends that the trial court erred in imposing an excessive sentence for the Defendant's especially aggravated robbery conviction and that the court further erred in imposing consecutive sentences.

The court sentenced the Defendant to life imprisonment for the felony murder conviction and ordered that the sentence for especially aggravated robbery run consecutively to the life sentence. The court sentenced the Defendant as a Range I standard offender to twenty years for the especially aggravated robbery conviction, which falls halfway between the maximum and minimum sentence allowed for the crime.

When an accused challenges the length, range, or the manner of service of a sentence, this court has a duty to conduct a de novo review of the sentence with a presumption that the determinations made by the trial court are correct. Tenn. Code

Ann. § 40-35-401(d). This presumption is "conditioned upon the affirmative showing in the record that the trial court considered the sentencing principles and all relevant facts and circumstances." State v. Ashby, 823 S.W.2d 166, 169 (Tenn. 1991).

In conducting a de novo review of a sentence, this court must consider: (a) the evidence, if any, received at the trial and the sentencing hearing; (b) the presentence report; (c) the principles of sentencing and arguments as to sentencing alternatives; (d) the nature and characteristics of the criminal conduct involved; (e) any statutory mitigating or enhancement factors; (f) any statement that the defendant made on his own behalf; and (g) the potential or lack of potential for rehabilitation or treatment. Tenn. Code Ann. §§ 40-35-102, -103, and -210; see State v. Smith, 735 S.W.2d 859, 863 (Tenn. Crim. App. 1987).

If our review reflects that the trial court followed the statutory sentencing procedure, imposed a lawful sentence after having given due consideration and proper weight to the factors and principals set out under the sentencing law, and that the trial court's findings of fact are adequately supported by the record, then we may not modify the sentence even if we would have preferred a different result. State v. Fletcher, 805 S.W.2d 785, 789 (Tenn. Crim. App. 1991).

The presentence report reflects that the Defendant had a prior criminal record in Georgia that included numerous arrests and convictions on such charges as forgery, unlawful possession of a weapon, theft, and several DUI's. He also had an unstable past work history, and admitted to having an alcohol problem.

Under the 1989 Criminal Sentencing Reform Act, the sentence to be imposed by the trial court is presumptively the minimum sentence in the range unless enhancement factors are found. Tenn. Code Ann. § 40-31-210(c). Procedurally, the

trial court is to increase the sentence within the range based on the existence of enhancement factors and then, reduce the sentence as appropriate for any mitigating factors. Id. at (d) & (e). The weight to be given to any one factor is left to the trial court's discretion so long as it is consistent with the purposes and principles of the act and is supported by the record.

In sentencing the Defendant, the trial court applied three enhancement factors found in Tennessee Code Annotated section 40-35-114:

(5) The defendant treated or allowed a victim to be treated with exceptional cruelty during the commission of the offense;

(8) The defendant has a previous history of unwillingness to comply with the conditions of a sentence involving release in the community; and

(13) The felony was committed while the defendant was on parole.

Id.

The Defendant argues that the trial court erroneously applied enhancement factor five (5), that the Defendant "treated or allowed a victim to be treated with exceptional cruelty during the commission of the offense." We agree.

The trial court applied factor five, reasoning that the victim befriended the Defendant and the co-defendant, and was merely drinking with them when he was killed. The court indicated that although the Defendant may have been agitated with the victim because the victim was allegedly flirting with the co-defendant, the resulting death was senseless and ridiculous.

Although the Defendant undoubtedly acted with cruelty in beating and killing the victim, this enhancement factor requires a strong showing of "exceptional" cruelty. Exceptional cruelty is usually found in cases of abuse or torture. See State v. Davis,

825 S.W.2d 109, 113 (Tenn. Crim. App. 1991), perm. to appeal denied, id. (Tenn. 1992). For instance, in Manning v. State, 883 S.W.2d 635, 639 (Tenn. Crim. App. 1994), this court found the exceptional cruelty factor was not applicable in a case in which the Defendant abducted the victim and forced her to participate in four sexual acts while holding a knife to her person, using abusive language toward her, and making threats to harm her.

This court has previously read the phrase "exceptional cruelty" to mean cruelty above that needed to effectuate the crime. State v. Lester Bennett, No. 03C01-9403-CR-00104, Sevier County (Tenn. Crim. App., Knoxville, filed Dec. 8, 1994). In the case sub judice, the facts applicable to this factor are what elevated the offense to especially aggravated robbery under the law.³ Although it was undoubtedly cruel to beat the victim to death, the case involved no extended length of torture, nor any unusual type of abuse that would uphold the use of this factor. We find no evidence in the record to support a finding of exceptional cruelty.

Although the trial court found another enhancement factor applicable, that the defendant had a previous history of criminal convictions or criminal behavior, he declined to apply this factor to enhance the Defendant's sentence. Tenn. Code Ann. § 40-35-114(1). The court found no mitigating factors applicable to the case.

Although we have concluded that the trial court erred in applying factor (5), we do not find that the Defendant's sentence should be reduced. Factor (1) is applicable to this case. If other enhancement factors are supported by the record, this court may apply those factors in conducting our de novo review. State v. Adams, 864 S.W.2d 31, 34 (Tenn. 1993). Thus, the three applicable enhancement factors and the lack of any

³Especially aggravated robbery is robbery, as defined in § 39-13-401, which is (1) accomplished with a deadly weapon, and (2) where the victim suffers serious bodily injury. Tenn. Code Ann. § 39-13-403.

mitigating factors justify the imposition of a mid-range sentence of twenty years for especially aggravated robbery.

The Defendant next argues that the trial court erred in making the sentence consecutive to his life sentence for first degree murder. In imposing consecutive sentences, the trial court found that the Defendant was "an offender whose record of criminal activity is extensive," and "a dangerous offender whose behavior indicates little or no regard for human life, and no hesitation about committing a crime in which the risk to human life is high." Tenn. Code Ann. §§ 40-35-115(b)(2), (b)(4).

These two factors were taken from Tennessee Code Annotated section 40-35-115, which sets forth the statutory criteria for concurrent and consecutive sentencing. The section was essentially a codification of the holdings of two Tennessee Supreme Court cases dealing with concurrent and consecutive sentencing, Gray v. State, 538 S.W.2d 391 (Tenn. 1976), and State v. Taylor, 739 S.W.2d 227 (Tenn. 1987). In Gray, the Tennessee Supreme Court listed five categories of offenders for which consecutive sentencing should be reserved: Persistent offenders, professional criminals, multiple offenders, dangerous mentally abnormal persons, and dangerous offenders. Taylor and the subsequently codified statute expanded the list to include "defendants convicted of two or more statutory offenses that involve sexual abuse of minors," persons committing an offense while on probation, and persons sentenced for criminal contempt.

When considering a consecutive sentence based on a finding that a defendant is a dangerous offender, the Supreme Court recently provided additional guidelines in State v. Wilkerson, 905 S.W.2d 933 (Tenn. 1995). The court said that proof that a defendant was a dangerous offender, standing alone, was not enough to sustain the imposition of consecutive sentences. Id. at 938. The court specifically said that "every

offender convicted of two or more dangerous crimes is not a dangerous offender subject to consecutive sentences." Id. The court held that "[t]he proof must also establish that the terms imposed are reasonably related to the severity of the offenses committed and are necessary in order to protect the public from further criminal acts by the offender." Id. Additionally, the sentence must be in accordance with the principles set forth in the Sentencing Reform Act. Id.

The trial court in the present case found the Defendant to be a dangerous offender; however, he also found the Defendant's previous extensive criminal background to be a second factor justifying the imposition of consecutive sentences. The Defendant's aggregate sentence for both offenses with which he was charged totaled life plus twenty years in confinement.

The Defendant brutally beat the victim to death with a tire tool with little or no provocation before taking the victim's money and automobile. The Defendant has an extensive criminal background and apparently has not made an effort to lead a productive life in society. In analyzing the case under Wilkerson, we find that such a lengthy sentence is necessary to protect the public from further criminal conduct by the Defendant. Also, in light of the senselessness and cruelty of the murder and the robbery, we conclude that the length of the sentence reasonably relates to the severity of the Defendant's crimes.

Based on the foregoing, we conclude that the trial court did not err in imposing consecutive sentences. Accordingly, the judgment of the trial court is affirmed.

DAVID H. WELLES, JUDGE

CONCUR:

GARY R. WADE, JUDGE

JOHN H. PEAY, JUDGE